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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

VS.

NANNIE S. McWHIRTER,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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This is a writ of error from a judgment of the Circuit Court of the United States in and for the Ninth Circuit and Northern District of California, in an action in which Nannie S. McWhirter, the present defendant in error, was plaintiff, and the Connecticut Mutual Life Insurance Company was defendant. The action was brought to recover the sum of fifteen thousand dollars with interest, upon two policies of insurance, the first in the sum of $5,000, and the second in the sum of $10,000, upon the life of one Louis B. McWhirter, deceased. The first of said policies was issued by the defendant upon the 19th day of December, 1891. The second policy was issued by the defendant upon the 15th day of March, 1892. The complaint was filed in the Court below upon the 7th day of January, 1893. It contains two counts, one upon each policy. The defendant appeared and demurred to the complaint, which demurrer was overruled by the Court, after full argument. Subsequently the defendant

answered the complaint. In this answer two defenses were made: First, that the insured, Louis B. McWhirter, deceased, had committed suicide; second, that the insured had fraudulently suppressed and concealed certain facts material to the risk. Upon these issues a trial was had before a jury, which terminated in a verdict for the plaintiff for the full amount of both policies, with interest up to the date of the verdict. Judgment was thereupon entered in favor of the present defendant in error, from which judgment this writ of error has been taken.

As we have hitherto stated, the defenses alleged were suicide and fraudulent concealment and suppression of material facts by the insured.

Inasmuch as a verdict or finding in an action at law cannot be assailed as contrary to the evidence in a federal court upon a writ of error, we should not deem it necessary to answer or comment upon the statement of facts set forth in the brief of counsel for plaintiff in error, were it not that such statement so far deviates from our understanding of the facts as they appear in the evidence that we deem it our duty to deny its statements and rebut the inferences which counsel for plaintiff in error seek to draw therefrom.

The deceased, Louis B. McWhirter, at the date of his death, which took place on the 29th day of August, 1892, at the city and county of Fresno, was of the age of thirty-eight years. He was a lawyer by profession. He was a married man, with one child, then of the age of about three years. Though without fortune himself, he was the son of parents in comfortable circumstances, and his wife was a young lady of some present estate, with handsome

expectations from her mother, who was a lady of large wealth. At the time of his death Louis B. McWhirter was in vigorous health and in the full flush of manhood. He had not accumulated any estate at that time. He enjoyed the respect and confidence of a large number of persons in the community in which he resided. Although without credit, based upon pecuniary standing from the point of view of banks and bankers, he was universally considered an honorable man, prompt to defray his obligations. There is not a scintilla of evidence in the entire record of the case at bar that at the time of his death he was indebted for more than the sum of $500. At the time of his marriage to his present wife, formerly Miss Blasingame of Fresno county, he was without any acquired fortune. At that time Miss Blasingame was worth, or supposed herself to be worth, about $15,000. This was her separate estate, entirely apart from any expectations or inheritance to be realized upon the death of her mother.

In the brief for plaintiff in error on file in this case, many statements are made which are conclusively refuted by the facts as they appear in the record. Louis B. McWhirter is pictured in that brief as a man whose whole career, personal, political and professional, had been a failure; who had reached the age of thirty-eight without having acquired a competency; who had dissipated his wife's fortune; who was under arrest upon a criminal charge involving moral turpitude; who was surrounded by enemies; and who had reasonable cause to believe that his life would be attempted by the latter.

The explanation of these statements is prompt and

easy. It appears in evidence that at the time of the marriage of Louis B. McWhirter to Miss Blasingame she was the owner of a mortgage from one John C. Rorden for $150; of another mortgage from J. A. Land for $1,000; of another mortgage from J. Ferber and Annie Ferber for $400; that all of these mortgages were paid and satisfied of record within one year after the marriage; that shortly after her marriage Miss Blasingame executed a deed to her mother for the sum of $850 of certain property in the town of Fresno; that she made a mortgage to the Farmers' Bank of Fresno of certain other property for $600; another to the Fresno Loan and Savings Bank for $400; another to the same for $1,500; another in conjunction with her husband to the same for $1,000. It was also proved that after the marriage, Mrs. McWhirter, formerly Miss Blasingame, executed a deed to W. D. Tupper of a piece of land in the town of Fresno, and received back from said Tupper a mortgage for $775. From these mortgages and conveyences it followed that Miss Blasingame received $1,550, at dates recently prior to her marriage to the deceased, and that she made mortgages upon her estate for the aggregate sum of $4,350 within six months after her marriage to McWhirter; that she likewise received $775 from W. D. Tupper on the first of February, 1889. It therefore appears that the total sum of $6,665 passed through the hands of Mr. and Mrs. McWhirter within a year before and a year after their marriage.

There is no evidence whatever that the payment of the mortgages made to Mrs. McWhirter and the payment by her of mortgages made by her completely exhausted her

estate; on the contrary, there is direct and positive evidence to the effect that she still had a reasonable amount of property. At the time of her marriage to the deceased she estimated her property at from $12,000 to $14,000, and at the time of her husband's death there was an indebtedness on the same of some $3,200 to $3,500.

But the charge of dissipation of his wife's estate, which is brought against the deceased, is explained by the plaintiff in a most satisfactory manner. The mortgage to the Fresno Loan and Savings Bank for $1,500, dated May 15, 1889, was expended in improvements upon the property upon which she resided after her marriage, and has ever since retained. The sum of $400, raised by the mortgage to the same bank on July 31, 1891, was expended in a visit to San Francisco on account of her infant, who was then very ill. The $700, which was obtained by the sale of certain property in Fresno for that sum, was received before the marriage of the plaintiff with her late husband, and used in the purchase of her wedding outfit. A sum of from $275 to $325 of the moneys raised from these various sales and mortgages was expended in paying for the grading of streets in front of lots owned by the plaintiff in the city of Fresno, and the taxes upon her property. It thus appears that the charge of having married a woman, and dissipated her estate, is totally without foundation; that $1,500 of the sums raised by mortgage upon her separate property was expended in the erection of a dwelling, which constituted the home of the family, and which she still owns; that seven hundred dollars of that sum was expended in her wedding outfit, and that $400 was likewise expended in

a trip to San Francisco for the purpose of procuring medical assistance for her infant who was then ill. The entire amount which could by any possibility have been expended by the deceased for his own uses and purposes, raised out of his wife's estate, was the sum of $3,825, a sum of less than $100 per month during the entire existence of the community. The charge of dissipation of his wife's estate is therefore conclusively refuted. If she was worth from $12,000 to $14,000 at the time of her marriage, she still has more than three-fourths of that sum in money or money's worth.

The charge of lack of professional success is based entirely upon the assumption that a man who has accumulated nothing in the profession of the law at the age of thirty-eight is, necessarily, a man who has failed in his profession. This would be a hard rule to apply to the most distinguished practitioners that have ever graced the profession. Daniel Webster's debts were paid twice by popular subscription taken up in the city of Boston, after he had been a member of the House of Representatives, the Senate, and the Cabinet of the United States. The statement that a man is necessarily a failure, who has accumulated nothing in the practice of the law at the age of thirty-eight, is one which is not borne out by the general experience of the profession. It is true that he had been compelled to draw upon his parents for money. He had come into a new country, and was a comparative stranger. In the long and weary struggle to establish himself in the practice of the law, which is the lot of every man entering upon the profession, he had been compelled to invoke the assistance of those upon whom

he was entitled to make a claim by the law of nature. This claim was frankly admitted and complied with. True, he had been compelled to borrow money from his friends for the purpose of procuring an outfit for his wedding, but this sum was honorably repaid. He was a man without credit at banks or among bankers, but the same banker who refused to lend him the funds of the bank of which he acted as manager, lent him his personal funds to the extent of $250 without taking a note and without demanding security. This money was honorably repaid.

He had been arrested upon a criminal charge, but the charge was not brought to trial. The complaint against him was lodged in the Police Court of the city of Oakland on the 15th day of March, 1892, and had never been brought to trial up to the time of his death, which occurred on the 29th of August of the same year. He was admitted to bail upon the charge in the trivial sum of $200. The charge was the outgrowth of a dispute concerning a debt, which he alleged to have been fraudulently contracted by his accusers. It was an attempt, frequent in the annals of our Police Courts, to offset one charge by another. It was totally baseless, and was not urged by the prosecutor.

The statement of facts in the brief of counsel for plaintiff in error in this case exhibits an ingenious attempt to dovetail and piece out the evidence on two inconsistent charges, that of suicide, and that of fraudulent suppression of the fact that his life had been threatened and that he expected to be murdered. The inference of suicide in this cause is based upon the then situation of

McWhirter personal, professional and financial. The defense of fraud and concealment is based upon his alleged expectation that certain lawless persons would take his life. Much of the evidence which was introduced was applicable in one respect to the theory of suicide, and very little to the alleged defense of fraudulent suppression. We shall endeavor hereafter to segregate the testimony offered by the defendant, and show in what respect it is palpably insufficient to sustain either of the attempted defenses.

The theory of suicide in the case at bar is based upon an inference alleged to be the inevitable result of the facts alleged to appear from the evidence introduced at the trial in the Court below by defendant in error. These facts were, that McWhirter rose from his bed at or about three o'clock on the morning of the 29th of August, 1892; that he had heard a noise in the back yard of his premises; that he put on his shoes and trousers, took his revolver, spoke to his wife, went out of the front door of his house, went to the back yard, and was there killed by a pistol shot. It is contended by the counsel for the plaintiff in error that at that time six, and only six, shots were fired; that the deceased fired all six of them; that two revolvers of the same caliber, each of six chambers, and each with three discharged and three undischarged chambers, were found in reasonable proximity to his body; that two clubs of osage orange were found likewise near his body; that these clubs had been sawed by a saw subsequently found upon McWhirter's premises; that a piece of cloth formed in the shape of a mask, with holes cut in it for eye holes, was likewise found near his body;

that two boards were knocked off the rear fence of his premises and set up against the fence on that side fronting upon an alley which ran at the rear of his house; that those boards had been knocked off from the inside by a hatchet found in an outhouse on McWhirter's premises; that the first person who reached the scene was one Thomas Rhodes, who testified that he saw no person fleeing from the scene of death; that osage orange sawdust was subsequently found in a chicken house upon the premises of the deceased; that ropes were found tied upon the osage orange clubs, ostensibly to attach them to the wrists of the holders, which were made of cotton clothes line which were identical with the clothes line in the back yard of McWhirter's premises. From these facts the inference is deduced by the counsel for plaintiff in error that the deceased had prepared a sham scene of murder, and had then killed himself; that the whole arrangement of the scene was for the purpose of deceiving the insurance companies, and to lead their agents to the erroneous conclusion that McWhirter had been murdered; that his purpose was to kill himself, and by the act of suicide to endow his wife and orphan child with a fortune.

Against this alleged series of facts, evidence was adduced by the plaintiff which showed the following facts indisputably:

First. That McWhirter had never owned nor seen the six-chamber revolver marked with the triangle and the letter "H," found near his body.

Second. *That seven shots were fired*, conclusively indicating the presence of at least one other person at the

scene at the time of his death, even conceding both of the pistols found near the body to have been McWhirter's.

Third. That the sawdust found in the chicken-house in McWhirter's back yard had been placed there in the perpetration of a nefarious and infamous attempt to manufacture evidence in support of the theory of suicide by one Bury, a detective formerly employed by the authorities of the county of Fresno to ferret out the murderers of McWhirter and bring them to justice.

Fourth. That the alleged sawdust found upon the teeth of the saw alleged to have been found upon McWhirter's premises might have been dust produced by the sawing of any one of six different kinds of wood, and that no witness could positively affirm that it was osage orange sawdust.

Fifth. That the rope found upon the clubs, for the supposed purpose of attaching the same to the wrists of the carriers, was the ordinary clothes-line in general use throughout the city, county and State, of which hundreds of feet were then in use in every back yard in the town of Fresno.

It therefore appeared distinctly from the evidence that the theory of suicide had broken down completely. It rested entirely upon proof of the fact that McWhirter had owned, or had in his possession at the time of his death, the two pistols found near his body, and that but six shots were discharged in the affray. If, on the other hand, McWhirter had never owned, seen nor possessed but one of the pistols—if, in fact, seven shots were fired in the affray, the presence and agency of some third person in his death is indisputable. When to

this is added the fact that tracks were found of two persons advancing to and retreating from the rear gate of his premises, and in entering and departing from his back yard, the inference of the presence and agency of at least two assassins is inevitable, and the theory of suicide is conclusively rebutted.

On the other hand, the evidence as to the fraudulent suppression and concealment of the fact by the insured that his life had been threatened by certain evil disposed persons, animated by motives of personal enmity to himself, is equally weak and inconclusive. As we have previously remarked, the first of the policies sued upon in this action was dated December 19, 1891, and the other March 15, 1892. The application upon which the first policy was issued was dated November 19, 1891; that upon which the second policy was issued was dated March 7, 1892. It is certain that to constitute a fraudulent suppression or concealment in regard to the alleged threats of persons to take his life the same must have existed and come to the knowledge of the insured prior to those dates respectively; and there is not in the record of this case any testimony in the remotest degree tending to show such a state of facts.

In support of this defense the counsel for plaintiff in error refer in their brief (p. 11) to the testimony of J. H. Lane (Trans., p. 150) and of Thomas H. Bates (Trans., p. 232).

It is essential that the alleged threats and the knowledge thereof should have existed prior to, or at the time of the making of the applications for the policies respectively.

There is no testimony of J. H. Lane upon page 150 of the transcript. There is some testimony of this witness to be found on that subject at page 162 of the transcript, in which the witness described a conversation with McWhirter which took place in April, 1892. This was nearly five months after the application for the first policy, and nearly, if not quite a month after the application for the second. This falls far short of any proof that either the threats had been made, or the knowledge thereof by McWhirter had existed, prior to the 17th of November, 1891, or the 7th of March, 1892.

The evidence of Bates at page 232 is equally inconclusive. That witness testifies in regard to a conversation had with McWhirter about three months, or may be more, before his death. Inasmuch as his death took place on the 29th day of August, 1892, three months before his death would have been the 29th of May; four months before his death would have been the 29th of April; five months before his death would have been the 29th of March, which was three weeks after the issuance of the second policy; six months before his death would have been the 29th of February; seven months before his death would have been the 29th of January; eight months before his death would have been the 29th of December, 1891; nine months before his death would have been the 29th of November, 1891. No other conversation or the date thereof is referred to with any degree whatever of accuracy, either as to time or substance, by any witness in the brief of counsel for plaintiff in error. A slight and indistinct reference was made by the witness J. E. Baker (Trans., p. 269), to a few re-

marks made by McWhirter on the day before his death, which was the 29th of August, 1892. This was five and ten months respectively after the making of the application for both of the policies in question.

Argument.

I.

The first point made by counsel for plaintiff in error is that it appears on the face of the complaint that only a part of the contract is set forth in the complaint and that the demurrer should have been sustained for that reason.

In support of this point the case of *Gilmore* vs. *The Lycoming Fire Insurance Company*, 55 Cal., 124, is cited. Of this case it is sufficient to say that it has been explained, if not overruled, by subsequent decisions in this State. In *Cowan* vs. *The Phœnix Insurance Company*, the case of *Bobbitt* vs. *The Liverpool and London and Globe Insurance Company*, 66 N. C.,70 (upon the authority of which latter case the decision in *Gilmore* vs. *Lycoming Fire Insurance Company* was based), was explained, and it was held that the complaint was sufficient. This case was followed by the case of *Blasingame* vs. *Home Insurance Company of New York*, 75 Cal., 633, in which it is held "that in an action on a policy of fire insurance the complaint must aver the loss, and show that it occurred by reason of a peril insured against, but it need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks."

These cases have in effect overruled the case of *Gilmore*

vs. *The Lycoming Fire Insurance Company*, which was itself a deviation from the general rule of pleading that in an action upon a written contract it was sufficient for the compiaint to set forth the substantial promise or contract which he claimed to have been broken by the defendant.

II.

But under any circumstances the fault in the complaint herein, if any there be, is cured by the pleading of the defendant. Whatever may have been the conditions, exceptions or limitations of the defendant's covenant or promise which were omitted in the complaint, they are fully set forth and made to appear by the answer herein, which sets forth the application and policy in each case in full. In such a state of the pleadings the error or defect, if any there was, is cured.

"If one of the parties expressly avers or confessed a material fact before omitted on the other side the omission is cured. For the defect in the pleading of the one party is thus supplied by the pleading of the other, and it may thus be made to appear, from the pleading on both sides taken together, that he on whose part the omission occurs is entitled to judgment, although his own pleading, taken by itself, be insufficient."

Gould's Pleadings, 166.

"If, however, the adverse pleading expressly admits the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error it seems becomes immaterial; as, in the instance before put, of a declaration in trespass in taking goods, omitting to show any title to or possession of the

goods, and the plea admitting the defendant's possession."

1 Chitty's Pleadings, 705; (16th Am. Ed.)
Hawthorne vs. *Smith*, 3 Nevada, 193.
U. S. vs. *Morris*, 10 Wheaton, 287.
Whittemore vs. *Ware*, 101 Mass., 355.
Vinal vs. *Richardson*, 13 Allen, 52.
Burns vs. *Cushing*, 96 Cal., 669.

The case of *Tischler* vs. *California Farmers' Fire Insurance Company*, 66 Cal., 178, contains nothing in support of the point made by counsel for plaintiff in error. *Gilmore* vs. *Lycoming Fire Insurance Company* is referred to incidentally by the Court upon a certain proposition, but without approval of the point therein laid down or analysis of its reasoning.

III.

The second point made in support of the demurrer to the complaint herein is frivolous. It is alleged in both counts of the complaint (Trans., pp. 5–10), "That due notice and satisfactory evidence of the death of the said assured, Louis B. McWhirter, was delivered to, and received by, the said defendant, at its office in Hartford, Connecticut, prior to the first day of December, 1892." The complaint herein was filed, as appears by the endorsement of filing by the Clerk of the Superior Court of the City and County of San Francisco on January 7, 1893 (Trans., p. 11). It therefore necessarily appears with absolute mathematical precision that more than thirty days, in fact thirty-eight days, must have elapsed and expired after due and satisfactory evidence of the

death of the insured had been received by the defendant before the commencement of this action. Conceding, for the sake of the argument, that such an allegation is necessary, it does not follow that it must be made in exact terms. It appears as inevitably that thirty-seven days have elapsed between the receipt of the proofs of death and the commencement of the action as it could possibly appear by a direct and positive statement that that number of days had in fact elapsed. It appears as certainly, as if in a certain case the allegation should be material that a man was eighty years of age at the time of his death, it should be alleged that he was born on the 1st of January, 1800, and died on the 2d of January, 1880. The authorities cited do not sustain the allegation. Only one of them makes the most distant reference to the immediate question upon which it is cited, and there was not in any of the pleadings in any of those cases any allegation from which the fact that thirty days had elapsed followed inevitably as a natural and mathematical consequence.

Abbott vs. *Aslett*, 1 Meeson & Welsby, 209, is a case decided under the former practice in England, under which practice the suing out of the writ, and not the filing of the declaration, constituted the commencement of the suit. It might well in that case have been that three months may have elapsed at the time of the filing of the declaration, but not at the time of the suing out of the original writ which was the commencement of the action. But, under our practice, the commencement of the action is the filing of the complaint, for which reason the case cited is totally inapplicable.

IV.

The next exception discussed by counsel for plaintiff in error was the ruling of the presiding Judge rejecting the testimony of E. F. Bernhard, which is found in the transcript at pages 235 and 236.

The testimony of the said Bernhard was in reference to a certain declaration of the deceased made about four years prior to the trial of the action. The trial of the case began on the 23d day of January, 1893. The conversation, therefore, took place at or near the month of January, 1889, which was about three years before the application of the deceased for either of the policies which form the subject of this action. It is contended that the evidence tended to show a suicidal purpose on the part of the deceased. The conversation arose under these circumstances: The witness Bernhard and the deceased had attended a banquet at the house of a certain Mr. Grady, and he was questioned by counsel for plaintiff in error in regard to a conversation in reference to suicide had with McWhirter in returning to their respective homes after the banquet. The conversation was in substance and effect that if he, the said McWhirter, ever did anything which would disgrace himself or his family, he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon himself and his family. In response to a question of the learned Judge who presided at the trial in the Court below in reference to the connection in which this conversation arose, the witness replied: "We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that

connection this conversation arose out of that." The evidence proposed to be elicited from the witness was objected to by counsel for the defendant in error, upon the ground that it was too remote; and, second, that it involved a comparison of the life, character, habits and circumstances of McWhirter with those of a third person. The objection was sustained on both grounds, and upon both grounds should be sustained by this Court. A random declaration made by a witness, or by a person insured, under the influence of the circumstances which usually attend a convivial gathering of that character, made three years at least prior to the application for insurance, and involving a comparison of the character, habits and actions of the declarant with those of a third person, is too remote and unsatisfactory to be the basis of a judicial finding, or the verdict of a jury. In the first place, it is too remote. Such a suicidal purpose, if it ever existed, might, and in all probability did, disappear upon reflection and increase of wisdom through age. In the second place, the declared purpose was conditional upon bringing disgrace upon the family of the declarant and the declarant himself, and upon his resemblance, or equality, or similarity in situation, character and habits to a third person. It involved an investigation by the Court into the character and habits of the third person mentioned, and a comparison of that character and those habits and actions with those of the decedent. It was purely collateral, and without weight in determining the issue.

V.

The next exception discussed by counsel for plaintiff in error relates to the burden of proof. An all-sufficient

answer to this exception is that upon the trial of this action the plaintiff in error claimed, demanded and assumed the burden of proof, and in pursuance of its claim and demand the Court in its discretion granted to it the important and substantial right to open and close both in evidence and upon the argument. Reference to the transcript on page 78 will show this assertion to be well-founded. The attempt to gain a substantial advantage in the Court below by demanding and assuming the burden of proof, and to repudiate that assumption after having lost the cause, is a method of practicing law which should meet the severe condemnation of this Court. But the ruling of the Court upon the burden of proof was correct under all the authorities.

Dennis vs. *Union Mutual Life Insurance Co.*, 84 Cal., 570.

Blasingame vs. *Home Insurance Co.*, 75 Cal., 635.

Home Benefit Assn. vs. *Sargent*, 142 U. S., 700.

The case of *Traders Insurance Co.* vs. *McConkey*, 127 U. S., 661, cited on this point by counsel for plaintiff in error, is totally inapplicable. That was a case in which the defendant made a policy of life insurance, in which it covenanted to pay upon the happening of a sole and single event, that was, the death of the insured by accident or accidental means. We should cheerfully concede, without the authority of the Supreme Court of the United States, or of any other court, that in an action upon such a policy the burden lay on the plaintiff to prove that the death of the insured happened by accident or accidental means, but in the case at bar the covenant of the defend-

ant is to pay in case of the death of the insured, with certain specified exceptions, and the burden of proof, according to all the authorities, lies upon the insurance company to bring itself within the exception.

The cases cited from Illinois of *M. L. Insurance Company* vs. *Hogan*, 80 Ill., 35, and *Garrettson* vs. *Pegg*, 64 Ill., 111, decide nothing more than the case of *Traders Insurance Co.* vs. *McConkey*, and are equally inapplicable to the proposition under discussion.

VI.

The next error alleged by counsel is the refusal of the Court to charge the jury as requested by the plaintiff in error in Instruction XII, which is set forth on page 301 of the transcript.

For the alleged error of the Court in refusing to give this instruction to the jury there are three sufficient reasons.

The question and answer in the application, upon which the ruling of the Court below was predicated, are the following: "Is there any fact relating to your physical condition, personal or family history, or habit, which has not been stated in the answers to the foregoing, *and with which the company ought to be made acquainted?*" The answer to that question was "No."

First. The question and answer taken together do not constitute a warranty on the part of the applicant for insurance. The question distinctly calls for the opinion of the applicant: Is there any fact, etc., with which the company *ought* to be made acquainted? This question embraces both the opinion of the person making the an-

swer and his moral obligation to state the fact. The question in that respect distinctly calls for a matter of opinion in either and both of its aspects. The task and burden of deciding the meaning of the question, and making an appropriate answer thereto, is thus thrust upon the applicant for insurance; and the question thereupon arises: Can a statement which is of itself, and by itself, by its necessary terms a conclusion and matter of opinion, be turned into a warranty by the agreement of the parties? We maintain the negative of the proposition. Cases are numerous in which the Supreme Court of the United States has held that notwithstanding an express declaration and covenant in a policy of insurance that certain statements therein contained should be held and deemed to be warranties, nevertheless, a fact stated as to a matter of opinion cannot be such as matter of legal conclusion.

In the case of *National Bank* vs. *Insurance Company*, 95 U. S., 673, it was held that a policy, which in terms stated that an application and survey of the premises insured should be a warranty, was, nevertheless, a mere representation as to the matters of opinion stated in the answers to the questions in the application. In this respect the Court says:

" It is the duty of the Court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used. It will be observed from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them;

whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, etc. These and similar questions refer to matters of which the assured had actual knowledge, or about which he might, with propriety, be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its 'estimated value.' His answers concerning such value were in one sense, and, perhaps, in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value, and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty, and observed good faith."

May on Insurance, sections 156, 160, 164, 168, 169.

Elliot vs. *Hamilton Mutual Insurance Co.*, 13 Gray (Mass.), 139.

Fitch vs. *American Popular Life Insurance Co.*, 59 N. Y., 557.

Germania Fire and Life Insurance Co. vs. *Casteel*, 9 Chicago Legal News, 374.

Franklin Insurance Co. vs. *Vaughan*, 92 U. S., 516.

Yeaton vs. *Fry*, 5 Cranch, 342.

Moulor vs. *American Life Ins. Co.*, 111 U. S., 335.

Now, in the instructions quoted, three propositions are asserted:

First. That the question and answer referred to were a warranty on the part of the insured that there was no fact in his personal history that would increase the hazard or increase the premium of the insurance.

Second. That it made no difference whether said representation was material or not; and

Third, *by necessary implication by the omission to state the fact, that it made no difference whether Mc Whirter knew that such fact existed or not.*

In the first place, the fact alleged to have been concealed, and to which the evidence adduced by the defendant upon the trial was mainly directed, was the fact that certain persons had threatened the life of the insured. There was no evidence whatever that such threats had been made at or prior to the time of making the respective applications for the policies which form the subject matter of this action. By a necessary consequence the insured could not have known facts which then existed. The result of the proposition of law as stated in the in-

struction, therefore, is that a policy of insurance may be avoided by an erroneous statement by the applicant for insurance in regard to facts concerning which he had or could have no possible knowledge. For this reason alone the instruction should have been refused. The necessary implication from the question itself is that the fact inquired of, whatever it may have been, must have been within the knowledge of the person making the application for insurance. It is impossible that any system of law or jurisprudence, based upon the fundamental principles of justice, could justify the conclusion that the liability of an insurance company upon a policy of insurance upon the life of a living being might be avoided by the existence or concealment of a fact not within the knowledge of the person seeking for the same.

Second. But we maintain that the question is too general and all-embracing to admit of a possible answer. It embraces not only the entire life and personal history of the applicant, but the lives and history of his ancestors, and submits the question to his judgment, and demands of him an answer at his peril. What fact could there be, apart from the 113 inquiries which preceded the question under discussion in the application for the policy, which could increase the insurance or the risk upon the life of the applicant? Many matters suggest themselves, and we shall specify a few for the sake of illustration. Would it be contended that the question required a disclosure of the fact that the applicant was then living and carrying on business under an assumed name, or that he was living in a state of adultery with the wife of another man, or that he kept a mistress, or that twenty years before in a

distant country he had committed a felony, or that he was addicted to the practice of masturbation, or of over-eating, or that in his early youth he had seduced a woman and knew that her father or brothers would, in the event of discovering his guilt in the matter, be certain to execute summary vengeance upon him? All of these things might occur to the mind of a person seeking for insurance. He might well reason to himself: I have already answered 113 questions, giving every particular in regard to the health, pursuits, character, hereditary diseases, length of life and occupation of my ancestors and collateral relatives for two generations, as well as my own; I am at a loss to conjecture what can possibly be left for me to do, and I must say I do not know of anything else upon which I should be able to afford the company the slightest information. Unless, therefore, this Court is prepared to hold that the non-disclosure of events and facts not within the knowledge of the applicant, or of facts as remote from the question of his fitness as a subject for insurance as the fact that he bore a false name, or had committed the offense of seduction twenty years before, or had committed a felony in his youth in a distant country, we cannot imagine how this question could be answered. It is a mere generality, and defeats its purpose. Such a question has never yet been made the subject of judicial construction. It is referred to in the case of *Moulor* vs. *American Life Insurance Co.*, 111 U. S., 335; but the question was not judicially construed.

For these reasons we insist that the question itself is void for generality and uncertainty, and that it cannot with safety be answered by any applicant for insurance.

It is a drag-net thrown out by the company, in issuing its policy, to bring up from the depths of the past some excuse to evade the payment of a just obligation. A policy or application containing any such provision should instantly be declined by any applicant for insurance.

Third. But under any circumstances, we contend that the statement in general terms that no fact exists with which the company ought to be made acquainted is not a warranty, but a *concealment;* and that a concealment must be of a material fact, and in this respect differs from a warranty. In this view of the case the Court was right in submitting the question of the materiality of the fact alleged to have been concealed to the jury.

Fourth. Lastly, we contend that the instruction was totally abstract, and should have been refused, and that there was no evidence in the case rendering such an instruction necessary or proper. The defense had entirely failed on the issue of fraudulent concealment of threats alleged to have been made against the life of McWhirter prior to his application for the policies in question. We do not care to repeat on this point the testimony of Lane and Bates and J. E. Baker, to which we have hitherto referred. Each and all referred to threats and apprehensions of danger which had their origin from three to six months after the making of the applications for the policies in question. The assumption that McWhirter procured insurance to the extent of $60,000 upon his life under the influence of these threats and apprehensions is without foundation. The policies sued

upon in this action were *the first two obtained by McWhirter*, and they constituted an amount no greater than a moderate provision for his family in case of death. There being no proof whatever that the threats against, or apprehensions of violence upon the part of McWhirter, existed or were brought to his knowledge prior or at the time of the making of the applications for the policies of insurance, its refusal of the instruction in question, if erroneous, was without injury to the plaintiff in error, and is therefore no ground of reversal; but on this point, as on others to which we have previously called the attention of the Court, the present position of the counsel for the plaintiff in error is strangely at variance with their line of defense as exhibited in the pleadings in this action. The answer of the defendant in this respect is as follows (Trans., p. 36):

"The said McWhirter, prior to the making of said application for insurance in the defendant corporation, had difficulties of a personal nature in the said county of Fresno with certain persons to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor. *That said threats were believed by said McWhirter, and that said McWhirter greatly feared by reason of said threats and his belief therein, that his, said McWhirter's, life was in great and immediate danger from said persons, and acting upon such belief, and solely by reason thereof, the said McWhirter made the said application.*"

The necessary implication of the answer in this respect, which is the same in regard to both policies, is that

the threats existed prior to the application for the policies respectively, and that McWhirter knew of the same.

We decline to follow counsel for plaintiff in error in his lengthy examination of the authorities upon the nature of a warranty and the necessary and inevitable legal consequence of a breach of such warranty on the part of the insured. It may be conceded, for the sake of the argument, that a breach of warranty affords a just and perfect defense to the insurer. This discussion, in our opinion, is totally apart from the question. We have preferred to place the argument upon the following grounds:

First. That, by the terms of the application and the policy, the immediate matter under discussion does not constitute a warranty pure and simple in the sense that a breach of the same would constitute a perfect defense.

Second. That the matters inquired of are matters of opinion and moral obligation, upon which a warranty and its legal consequences cannot be predicated.

Third. That the conduct of the insured in the application was, if anything, a concealment, which must be a concealment of a material fact.

Fourth. That the Court was justified in submitting the question of materiality, with appropriate instructions, to the jury to determine that question, to the jury itself.

Fifth. That there was no evidence upon which the instructions could be reasonably predicated, either that the fact complained of existed, or that McWhirter knew of the same before or at the time of making the application for the policy, and that, in the last point of view, the error, if any, was totally without injury.

VII.

The defendant's next point is that the Court in effect withdrew from the consideration of the jury the questions of breach of warranty and fraudulent concealment, and submitted to it only the question of suicide. This is a far-fetched and unnecessary conclusion from the language of the Court in its charge. The Court in its charge (Trans., p. 293), instructed the jury as follows:

"You are further instructed that the entire theory of defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired on to the fences and outhouses upon the premises; and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination, or scene of murder, and then killed himself. If you should find that Louis B. McWhirter did not make such preparations; that he did not saw the club found upon his premises; that he did not prepare the mask; that he did not own or possess both pistols; and that he did not fire all the shots, the bullet holes of which are found in the fence and outhouses and on his own body, your verdict should be for the plaintiff."

In all of the extracts from the charge of the Court, given on page 31 of the brief of the counsel for plaintiff in error, the portions quoted are detached from the context, but, when taken together, they all show that the remarks

of the Court in the language complained of were necessarily *confined to the immediate issue and defense under discussion.* The instruction, as quoted, that if McWhirter was killed by accident the plaintiff is entitled to recover, necessarily means that the plaintiff is entitled to recover *upon the issue and defense of suicide.* Again, that portion of the charge of the Court, quoted by counsel on the other side, to the effect that the entire theory of defense in this case is based upon the assumption that McWhirter prepared the clubs and the masks found upon his premises shortly after the killing, etc., must necessarily be construed to mean that the entire theory of the defense then being explained by the Court to the jury, to wit: that of suicide, was based on that assumption; and the concluding clause of the paragraph of the charge quoted to the effect that "your verdict should be for the plaintiff," could mean nothing more than that their verdict should be for the plaintiff upon the issue under discussion, to wit: suicide. Any other construction of the charge of the Court is partial, carping and unfair.

VIII.

The next error alleged by counsel is the refusal of the Court to give to the jury Instruction XI, found on page 300 of the transcript. The same was properly refused, for the reasons above given, and because it omits the necessary qualification and limitation that McWhirter had any knowledge of the threats, or was under any appehension in regard to the same, at the time of the applications for insurance and the delivery of the policies which form the subject of this action. Another sufficient

reason for the refusal of the instruction was the fact that there was no proof that any threats of the kind complained of had been made until several months subsequent to the making of the applications.

IX.

The last point made by counsel for plaintiff in error relates to the refusal of the Court to give Instruction XIII, found on page 301 of the transcript. The instruction was properly refused, for the reasons advanced under our seventh and eighth points, and for the further reason that there was no proof whatever that McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assassination. The only difficulty of a personal nature of which there is any evidence was the unprovoked assault upon him by one Clem. Carroll, which was testified to by the witnesses Lyons and Meares. (Trans., pp. 279, 280, 281). This assault took place in the first week in May, 1892, which was six months and two months respectively after the execution of the policies in question.

It is respectfully submitted that the judgment should be affirmed.

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